# RESPONSIVE INSTITUTIONS FOR A MODERN CANADA

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# Introduction

In its proposals for the renewal of the Canadian federation, the Government has proposed the reform of institutions to improve responsiveness to the electorate and sensitivity to regional concerns, as well as to provide better cooperation and harmonization of activities between the federal government and the provinces.

To meet these objectives, the Government has proposed reform of the House of Commons, an elected Senate, decision-making authority for federal-provincial consultative machinery and greater provincial and regional sensitivity in decision making by relevant federal regulatory agencies and national cultural institutions. The Government has also proposed to strengthen the Supreme Court of Canada by entrenching a process to provide provincial and territorial input to appointments to the Court.

The purpose of this paper is to provide Canadians with more detail about these proposals and the reasons why the Government is recommending them for consideration.

# The Constitution: Powers and Institutions

Canada is a federation. A federation consists of a number of territorially-based units, in our case the 10 provinces and two territories, that have agreed to live together in order to obtain the benefits of unity. In a federation the territorial units are assigned powers of essentially a more local nature and the federal government is assigned powers that apply to the federation as a whole. Such powers are assigned to the two levels of government through the Constitution.

The Constitution provides both orders of government not only with powers but also with the institutions necessary for the exercise of those powers. In a democracy, such institutions must be representative in order that the powers assigned to them can be exercised in a way that is responsive to the electorate. In Canada, the Constitution provides such institutions, foremost being the federal Parliament and the legislatures of the provinces.

Canada's Constitution consists of formal statutes and documents, principally the *Constitution Acts* and amendments adopted periodically from 1867 to the present, and of informal conventions, which are practices that have evolved over time that have come to be regarded as accepted and necessary for the functioning of the federation and its constituent elements, the federal and provincial governments.

At Confederation attention was paid to the division of powers, not to the need for coordination of joint activities between the two levels of government. As society evolved and became more complex and technological, the need for cooperation grew. This became particularly apparent in Canada's post-war industrialization and expansion of the past half century. The need for coordination has been met through the evolution of informal machinery for federal-provincial cooperation and harmonization. Thus the machinery for coordination has been established through conventional, as distinct from formal, constitutional means.

The best known of these mechanisms is the First Ministers' Conference, which convenes from time to time to discuss matters of common interest to the members of the federation and the federal government. Because it has evolved informally, this

mechanism and an array of ministerial councils and committees of officials are not entrenched in the Constitution and have no formal decision-making authority.[1]

The Supreme Court has also evolved as an institution of ever-increasing importance to the functioning of the federation. Its decisions on constitutional questions affecting the division of powers and the jurisdiction of the two levels of government, and on the application of the Charter of Rights and Freedoms, are fundamental to the operation of democratic government in Canada.

The Government's proposals for institutional reform reflect, therefore, the structure of the formal Constitution and its informal evolution by addressing:

i. *The responsiveness of Parliament*, which is the institution through which the powers assigned to the federal government under the Constitution are exercised.

ii. *The strengthening of the Supreme Court* by providing a role for the provinces and territories in nominating its members.

iii. *The introduction of formal decision-making functions for federal-provincial mechanisms* designed to promote the efficient management of activities requiring cooperation between the federal government and the provinces.

[1] Note that the *Constitution Act, 1982* (and its 1983 amendment) provided (a) for at least three conferences of First Ministers to be convened within five years to discuss among other matters constitutional issues directly affecting aboriginal peoples; and (b) for a conference of First Ministers to review the amending formulae within 15 years of the coming into force of the provisions. These provisions, however, refer to specific meetings rather than enduring mechanisms for joint action.

# Parliament: The House of Commons

***House of Commons Reform***

**The Government of Canada commits itself to a process of further parliamentary reform to give individual MPs more free votes and to reduce the application of votes of confidence.**

## Representative and Responsible Government

The House of Commons is the cornerstone of our system of democratic government. It is *representative* of the electorate, its members being chosen by the people on the basis of one person, one vote.[2] Those of its members who make up the Government (Ministers) are *responsible* to the House for the actions of the government. In the Canadian system of government, the executive and the legislative functions are fused in the single institution of Parliament, and more particularly in the House of Commons. This fusion is the essence of parliamentary democracy, and its successful functioning depends on the paramountcy of the House of Commons.

Proposals for House of Commons reform must fully reflect the fundamental function of the institution in holding the Government to account on behalf of the people.

## A More Responsive House of Commons

Within these parameters, the Government wants to see reforms that will empower citizens by making the House of Commons more relevant, representative and sensitive to Canadians. It awaits the forthcoming report of the Royal Commission on Electoral Reform and Party Financing for further recommendations to achieve these objectives. The Government wants to encourage reforms that will reduce partisanship and make parliamentary processes more open. A better balance is required between the exigencies of political party discipline, necessary for effective

[2] Representation by population is ensured by maintaining, to the greatest degree practicable, the fundamental democratic principle of "one person, one vote", as demonstrated by the statistics set out below in the "Options for an Upper House" section. There are, however, inevitable deviations from this principle as absolute equality of voters is impossible to achieve, given Canada's vast geography, regional interests, shifting population and the constitutional provision guaranteeing all provinces no fewer seats in the House of Commons than they have in the Senate. Thus, for example, P.E.I., with roughly half a percentage point of the population, has slightly more than 1% of the seats in the House of Commons.

government and effective opposition, and the need for Members of Parliament to work with other Members across party lines to represent the views of their constituents effectively.

To this end, the Government wishes to discuss a variety of initiatives with all parties in the House to reduce unnecessary partisanship and enhance the effectiveness of the House of Commons. A major thrust of these initiatives is to provide Members of Parliament with more opportunities to represent the views of their constituents and their regions in the daily business of the House and to contribute more effectively to the legislative process.[3]

The Government has proposed:

### *1. More Free Votes*

The legitimacy of the Government depends on its ability to demonstrate that it continues to command the confidence of the House of Commons. It is clear that a specific Government proposal may be defeated in the House without necessarily implying that the Government no longer has the support of a majority in the House of Commons. However, the specific circumstances in which the defeat of a Government measure constitutes a loss of confidence are not well established.[4] The Government proposes, therefore, to work with the Opposition parties to set out clearly the types of motions and votes to be treated as confidence matters. This, in turn, will allow for more free votes by providing Members of Parliament with new opportunities to vote outside political party lines on a wider range of issues, without threatening the stability of the Government of the day.

### *2. Expanded roles for Parliamentary Committees*

The Government also proposes for consideration new procedures to refer bills to Parliamentary committees after first reading. Under current procedures, legislation is referred to committees for detailed examination only after that legislation has been approved in principle at second reading. As a result, the principles on which the legislation is based have already been approved, and the role of committees is limited to assessing the adequacy of the proposed legislation in respect of those basic elements of the Bill. Under these new procedures, in contrast, Members of Parliament sitting in committee would be able to examine the fundamental objectives and principles of the proposed legislation before the initiative is put to the House as a whole for approval in principle.

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[3] This would be in keeping with recent House reform initiatives to allow individual Members of Parliament more time in their constituencies; more opportunity to debate; and more opportunity to bring forward private members' bills and motions. These initiatives also aimed to encourage more government consultation with standing and legislative committees on policy development, and to improve the flow of parliamentary business. (See the news release issued by the Office of the Leader of the Government in the House of Commons, March 25, 1991.)

[4] Clearly, there is no ambiguity in the case of a successful non-confidence motion. Equally, where the defeated measure is of little importance, the vote will not be considered a loss of confidence. Matters are, however, more complicated when the Government loses a vote on a question of important policy or even a budget measure. In the end, under current arrangements it is for the Government to decide if it can garner sufficient support in the House to continue in office. For example, the minority governments under Prime Ministers Trudeau (1972-74) and Pearson (1963-68) lost several recorded votes without asking for dissolution. In fact, the Pearson Government lost a "snap vote" on a budget bill in 1968, but later won the support of the majority on a confidence motion.

### *3. Enhanced Opportunities for Private Members' Bills*

If the views and aspirations of Canadians are to be most effectively represented by their Members of Parliament, then individual Members must be able to exercise their ability to put forward legislation — i.e., Private Members' Bills — for consideration by the House. The Government recognizes that existing procedures are not consistent with the effective operation of this process because the limited time available for discussion of Private Members' Bills in the House inhibits the success of such initiatives. Therefore, the Government is prepared to work with the Opposition to provide more House time for the examination of such legislation.

### *4. By-Elections*

The right of all Canadians to be represented in the House of Commons is fundamental to the proper functioning of our system of government. At present, there is no limit on the amount of time that may elapse before a by-election is held. This is inconsistent with the Government's commitment to make the House of Commons responsive and fully representative of the electorate. Therefore, the Government will consider ways of ensuring that by-elections are held promptly, following vacancies in the House.

### *5. Open and Effective Parliamentary Processes*

As citizens in a democracy, Canadians have a basic right to know how those elected to govern are exercising the powers conferred on them. The proposals put forward by the Government for reform of the House of Commons are designed to facilitate cooperation and consensus across party lines to make the House both more responsive to citizens' needs and more open to public scrutiny. As part of its reform initiatives, the Government wants to explore the possibility of making changes to Question Period to enhance the ability of Members to ask questions of the Government that are tied more directly to the concerns of their constituents. The Government also wants to explore how the openness and visibility of parliamentary procedures might be improved.

In providing greater autonomy to individual Members of Parliament, the Government recognizes that such changes must not hamper the ability of political parties to forge internal consensus across regional, linguistic and social lines in order to promote the interests of the country as a whole.[5] This applies particularly to the proceedings of the Cabinet and of party caucuses. It is essential that Ministers and Members be able to speak freely in order that the Government, its caucus and the caucuses of the Opposition parties are able to play effectively their essential roles of forging national consensus among the wide range of regional and minority viewpoints

[5] The Macdonald Commission noted that "cohesive disciplined political parties" are fundamental to the effective functioning of responsible government in the pursuit of "the ideal of a national government which is responsive to national constituencies and which pursues comprehensive national goals." *Report of the Royal Commission on the Economic Union and Development Prospects for Canada* (Macdonald Commission), 1985, vol. III, p. 83.

represented within each of these organisations. The ability to "think out loud", to bring to the table a particular position and come over time to support a consensus that is different, is the essential function of the political process.

A less confrontational and more constructive approach to the business of government will enhance public confidence in Parliament. Individual Members will be able to play a greater role in ensuring that the views of their constituents and their regions are reflected in the legislation adopted by Parliament, in a manner consistent with the essential role played by parties in the political process. The Government believes that these reforms are necessary to enhance the effectiveness of Parliament in responding to the aspirations and needs of Canadians.

## Implementation

The House reform measures contemplated by the Government will be discussed and developed with all parties in the House of Commons. Such changes would not entail constitutional amendments requiring the approval of the provinces. Rather, these proposals, which concern the inner workings of the House of Commons, could be effected by amendments to the House's Standing Orders and legislation.

# Parliament: The Senate

***An Elected, Effective, More Equitable Senate***

The Government of Canada proposes that the Senate be directly elected, that Senate elections coincide with elections to the House of Commons, and that the Senate's composition provide for much more equitable provincial and territorial representation than at present. The House of Commons would remain the primary legislative body and as a general rule, in order for measures to become law, approval of both the Senate and the House of Commons should be required as at present. For matters of language and culture, the Senate would also have a double majority special voting rule. For matters of national importance, such as national defence and international issues, the Senate would have a six-month suspensive veto. Following expiry of the suspensive veto, the House of Commons would be required to repass the legislation for it to become law. Since the Senate is not a confidence chamber, the Senate would have no legislative role in relation to appropriation bills and measures to raise funds including borrowing authorities. The Government also proposes that guaranteed representation be provided for aboriginal Canadians in the Senate. The Senate would continue to have a mandate to conduct special inquiries into issues of public policy, and the Government of Canada proposes that the Senate be given a mandate to ratify the appointment of the Governor of the Bank of Canada and the appointments of the heads of national cultural institutions as well as the heads of certain regulatory boards and agencies. The Government has asked the Special Joint Committee of Parliament to consider the form of direct election to the Senate, the appropriate number and distribution of Senate seats and, in consultation with the aboriginal peoples, the appropriate representation of Canada's First Peoples.

## Options for an Upper House

In 1867, when the original colonies — Canada (formerly Upper and Lower Canada), Nova Scotia and New Brunswick — joined together to form the Canadian federation, the Senate was created as the upper house of the federal Parliament, in part to represent the interests of the regions. As other provinces entered the federation, the size of the Senate was increased to provide them with representation. Much later, in 1975, provision was made for territorial representation. Over time, the

Senate achieved its current normal membership of 104. The seats are now apportioned among four divisions (24 each for Ontario, Quebec, the Maritimes and the West), plus six for Newfoundland and one each for Yukon and the Northwest Territories.

It has generally been accepted that the Senate has not fulfilled the function of safeguarding the interests of the constituent members of the federation, as envisaged when the Senate was debated at the confederation conference in Quebec City in 1864, during the formulation of what became the *British North America Act, 1867*. For many years, the Senate has been regarded as having limited legitimacy, principally because it is unrepresentative. It is not elected and its members are not representative of provincial governments — the two methods generally available to provide an upper house with a legitimate claim to represent the interests of the regions.[6]

For these reasons, reform of the Senate has been a consistent feature of the numerous proposals for constitutional change made by successive federal and provincial governments and by many private citizens and groups.

As the Government has noted in its proposal, Canada is alone among successful federations in not having a second legislative chamber adequately representing regional interests. The Government has noted the agreement of June 1990 by the Prime Minister and all Premiers to an elected Senate, to more equitable representation in the Senate of the less populous provinces and territories, as well as their commitment to the Senate having effective powers, while preserving the principle of the Government's responsibility to the House of Commons.[7] It is also aware that abolition of the Senate would not address chronic concerns about the lack of effective regional representation. Therefore, the Government has not canvassed the possibility of abolishing the Senate. Furthermore, it should be noted that, because abolition would alter the amending provisions set out in Part V of the *Constitution Act, 1982*, the unanimous agreement of the provinces and Parliament would be required for abolition. The Government has, therefore, proceeded on the assumption that the Senate should be retained and reformed to make it representative of the regional, social and linguistic diversity of Canada.

Previous proposals have advanced a variety of principles on which to base a reformed Senate. Some have advocated that members be appointed to represent the interests of provincial governments.[8] Others have recommended that members be popularly elected, using simple plurality or proportional representation systems.[9] There have also been proposals for Senators to be elected by provincial legislatures

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[6] Note that the pre-Confederation provinces of Canada and P.E.I. had elected or partly elected upper houses in the 1850s and 1860s.

[7] First Ministers' Meeting on the Constitution, *Final Communiqué*, June 9, 1990, Ottawa: Federal-Provincial Relations Office.

[8] Government of British Columbia, *British Columbia's Constitutional Proposals* Paper No.3, "Reform of the Canadian Senate", September 1978; Task Force on Canadian Unity (Pepin-Robarts), *A Future Together*, January 1979.

[9] Special Joint Committee of the Senate and the House of Commons on Senate Reform, *Report*, January 1984; The Macdonald Commission, 1985; Alberta Legislative Assembly, Select Special Committee on Upper House Reform, *Strengthening Canada - Reform of Canada's Senate*, March 1985; Canada West Foundation, *Regional Representation: The Canadian Partnership*, Task Force Report, 1981; Government of Newfoundland and Labrador, *Constitutional Proposal: An Alternative to the Meech Lake Accord*, 1989.

(the original U.S. model, which was changed to direct popular election in 1913), or for half to be elected by provincial legislatures and half by the House of Commons.[10]

The Government has considered carefully the option of a provincially appointed Senate. In particular, it reviewed the possibility of turning the Senate into a House of the Provinces similar to the German *Bundesrat*.

In Germany, the upper house, the *Bundesrat*, is composed of delegations of ministers from the Land (state) governments. They participate in the federal legislative process, exercising a veto in constitutional matters and in matters directly affecting Land interests. In practice, this represents about 60 per cent of all federal legislation. In other matters they have a suspensive veto. Each state votes *en bloc*, exercising from three to six votes, depending on its size.

If faithful to the German model, in Canada such an upper house would be composed of representatives of the provincial governments. They would exercise an absolute veto over constitutional amendments submitted by the House of Commons and over federal legislation affecting the interests of the provinces. Such an upper house would also exercise a suspensive veto over all other federal legislation.

The Government has not advanced a proposal on these lines for two reasons. First, it believes that the proposal to elect the Senate is more responsive to the expressed needs of Canadians generally and to the less populous regions in particular. Second, it is important to bear in mind that constitutions do not operate in vacuums. The basic law of a federation reflects the customs, values, traditions and history of its people. Thus, the example of Germany's *Bundesrat* needs to be set against the reality of German society, which is different from that of other countries, including Canada. The principle on which the constitution of Germany is built is also quite different from Canada's. In the German constitution the federal role is to set policy; that of the states is to administer the programs flowing from the policy. It is therefore appropriate to have the state governments sit in the federal parliament to approve or amend federal proposals which they are going to have to administer. In Canada the constitutional principle for the division of powers is not based on the distinction between policy and administration but, rather, is based on the principle of giving each level of government sovereign powers to support distinctly different areas of jurisdiction, each encompassing both legislative and executive action.[11] Thus, it has not been considered necessary or appropriate for one level of government to participate in the legislative institutions of the other. The Government is, however, proposing to satisfy the need for improved federal-provincial harmonization through other means, as described in detail later in this paper.

During the past 20 years, the proponents of Senate reform have concentrated their criticism of the existing institution not only on its unrepresentative character but also on the importance of reforming the Senate to make it more effective in counterbalancing the House of Commons. The need to counterbalance the House of Commons is felt most strongly in Western Canada and to a somewhat lesser degree in the

[10] See, for example, the Constitutional Amendment Bill, 1978.

[11] There are exceptions, such as the provincial administration of the federal criminal law power.

Atlantic provinces. These provinces consider that their interests are not adequately represented in the House of Commons. This is due largely to the democratic principle of representation by population that favours central Canada.[12]

These concerns have given widespread currency to the idea of a popularly elected, effective Senate that will redress the imbalance between the central provinces and those in the West and in Atlantic Canada by providing a mechanism to check the power of the House of Commons and ensure an adequate voice for all regions.

In light of these considerations, the Government has based its proposal on two central tenets. First, it wants to place the emphasis on making the Senate democratic and regionally sensitive, rather than making it a forum for representation of provincial governments and harmonization between the two levels of government. This will make the Senate a key institution dedicated to ensuring regional balance in the initiatives and activities of the federal government.

Secondly, the Government's proposal is for a distribution of seats that will provide for much more equitable provincial and territorial representation than at present. The political unit for each division would be provinces rather than regions. This would enable the Senate to provide a counterbalance to the House of Commons, where seats are distributed on the basis of representation by population.

In addition, the Government's proposal reflects its belief that the aboriginal peoples constitute a fundamental dimension of Canada that should be integrated in its political life and institutions, including the Senate. To that end, the Government has proposed guaranteed aboriginal representation in the Senate.

The critical elements in the design of the proposed Senate are:

- the method of election
- the number and distribution of seats
- the term of office and timing of elections
- the powers of an elected upper house.

## Method of Election

The Government has asked the Special Joint Committee to consider the most appropriate form of election for the Senate, bearing in mind the importance of representing the social diversity of the Canadian population and of representing different regions within the larger provinces. The Committee will wish to consider the advantages of the simplicity and familiarity to Canadians of the traditional first-past-the-

[12] Ontario and Quebec, with 61% of the population, have 59% (174 of 295) of the seats in the House of Commons. Equally, with 29% of the population the West has 29% (86) of the seats, and the Atlantic region with 9% of the population has 11% (32) of the seats. The territories with three seats between them have 0.3% of the population and 1% of the seats.

post system.[13] It will also wish to weigh the possible advantages of some form of proportional representation in helping to ensure balanced regional and national representation.[14]

There are many possible options for designing a system of proportional representation. For example, the German electoral system for its lower house is a combination of simple plurality (first-past-the-post) and proportional representation.[15] Australia, on the other hand, elects its Senators through proportional representation with single transferable votes, enabling voters to rank candidates in order of preference.[16] In all cases, balloting under a system of proportional representation is much more complex than the voting procedures to which Canadians are accustomed. Proportional representation systems also tend to strengthen the control of political parties over the selection and ranking of candidates, although this control is somewhat moderated under a system of single transferable votes. Whatever system is selected should reflect the objectives of ensuring that regional viewpoints and the diversity of the population are well represented, and keeping the system as simple as possible. The Special Joint Parliamentary Committee has been asked by the Government to consider options for electing Senators that would give expression to the social diversity of the Canadian population, keeping in mind the history of the inadequate political representation of women, aboriginal peoples and ethnic groups.

## Number and Distribution of Seats

As noted, the Government's proposal is for a much more equitable distribution of seats between provinces. This recognizes the reality that individual provinces rather than regions are the units that comprise the federation. Given the wide range of proposals for the composition of a reformed Senate (see Table 1), the Government has asked the Special Joint Committee on the Constitution to consider the best means of achieving a more equitable Senate, including the total number of seats required.[17]

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[13] The Special Joint Committee, 1984, recommended a simple plurality system: "To lessen party influence in the choice of senators, all but one of us prefer 'first-past-the-post' elections in single-member constituencies to proportional representation in multi-member constituencies.... We recognize that, in the absence of proportional representation for an elected Senate, the political parties will have to work hard to achieve balanced representation from across the country in the Commons and the Senate. This is as it should be. In striving to do this, they will have to adapt their policies accordingly, and this can only benefit national politics" (p. 3). The Alberta Legislature's 1985 proposal also preferred the first-past-the-post system currently used both federally and provincially.

[14] The Canada West Foundation, 1981, the Macdonald Commission, 1985, and the Reform Party of Canada (*Draft Constitutional Amendment to Reform the Senate of Canada*, May, 1988) all recommended some form of proportional representation.

[15] Half the members of the *Bundestag* are elected directly in local constituencies by plurality vote and the other half from lists presented by the parties in *each Land*. Electors cast two votes, one to choose their constituency representative and the other for the party list. The second, proportional vote is calculated on a Land, rather than national basis, and parties which receive less than 5% of the second vote are excluded.

[16] Six senators (twelve in a double dissolution) are elected at large from each state. Candidates are elected if they receive a quota of one-seventh (one-thirteenth in a double dissolution) plus one of the total votes. Candidates with more than their quota have their "surplus" votes distributed according to voters' indicated preferences. Lowest-scoring candidates are eliminated as necessary in order to arrive at the requisite number of senators. To make matters less complicated, many voters number their preferences in accordance with how-to-vote instructions from the political parties.

[17] The Prime Minister and the Premiers agreed, at the June 1990 First Ministers' Meeting on the Constitution, that the less populous provinces and territories should enjoy "more equitable representation" in the Senate. Note also that the Special Joint Committee, 1984, recommended that the distribution of Senate seats be weighted to increase Western and Atlantic representation. This, in the Committee's opinion, would better reflect the Canadian reality than absolute equality. The Macdonald Commission, 1985, also had this view.

## *Table 1*
## *Senate Composition Schemes*

| Prov | Current | | | | Joint Committee, 1972 | | | | Bill C-60, 1978 | | | | British Columbia, 1978 | | | | Task Force, 1979 | | | | Ont. Adv. Comm., 1978-79 | | | | Quebec Beige Paper, 1980 | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | by province | | by region | | by province | | by region | | by province | | by region | | by province | | by region | | by province | | by region | | by province | | by region | | by province | | by region | |
| Nfld | 6 | (5.8) | 30 | (28.8) | 6 | (4.6) | 30 | (23) | 8 | (6.8) | 32 | (27.1) | 3 | (5) | 12 | (20) | 4 | (6.7) | 14 | (23.3) | 2 | (6.7) | 7 | (23.3) | 3 | (3.8) | 13 | (16.3) |
| PEI | 4 | (3.8) | | | 4 | (3.0) | | | 4 | (3.4) | | | 3 | (5) | | | 2 | (3.3) | | | 1 | (3.3) | | | 2 | (2.5) | | |
| NS | 10 | (9.6) | | | 10 | (7.7) | | | 10 | (8.5) | | | 3 | (5) | | | 4 | (6.7) | | | 2 | (6.7) | | | 4 | (5.0) | | |
| NB | 10 | (9.6) | | | 10 | (7.7) | | | 10 | (8.5) | | | 3 | (5) | | | 4 | (6.7) | | | 2 | (6.7) | | | 4 | (5.0) | | |
| Que | 24 | (23) | 24 | (23) | 24 | (18.5) | 24 | (18.5) | 24 | (20.3) | 24 | (20.3) | 12 | (20) | 12 | (20) | 12 | (20) | 12 | (20) | 6 | (20) | 6 | (20) | 20 | (25) | 20 | (25) |
| Ont | 24 | (23) | | | 24 | (18.5) | | | 24 | (20.3) | | | 12 | (20) | | | 12 | (20) | | | 6 | (20) | | | 20 | (25) | | |
| Man | 6 | (5.8) | 24 | (23) | 12 | (9.2) | 48 | (37) | 8 | (6.8) | 36 | (30.5) | 4 | (6.7) | 12 | (20) | 4 | (6.7) | 22 | (36.7) | 2 | (6.7) | 11 | (36.7) | 5 | (6.3) | 27 | (33.8) |
| Sask | 6 | (5.8) | | | 12 | (9.2) | | | 8 | (6.8) | | | 4 | (6.7) | | | 4 | (6.7) | | | 2 | (6.7) | | | 5 | (6.3) | | |
| Alta | 6 | (5.8) | | | 12 | (9.2) | | | 10 | (8.5) | | | 4 | (6.7) | | | 6 | (10) | | | 3 | (10) | | | 8 | (10) | | |
| BC | 6 | (5.8) | | | 12 | (9.2) | | | 10 | (8.5) | | | 12 | (20) | | | 8 | (13.3) | | | 4 | (13.3) | | | 9 | (11.3) | | |
| Ykn | 1 | (1.0) | 2 | (1.9) | 2 | (1.5) | 4 | (3.0) | 1 | (0.8) | 2 | (1.7) | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| NWT | 1 | (1.0) | | | 2 | (1.5) | | | 1 | (0.8) | | | - | - | | | - | - | | | - | - | | | - | - | | |
| Total | 104 | (100) | 104 | (100) | 130 | (100) | 130 | (100) | 118 | (100) | 118 | (100) | 60 | (100) | 60 | (100) | 60 | (100) | 60 | (100) | 30 | (100) | 30 | (100) | 80 | (100) | 80 | (100) |

| Prov | Canada West, 1981 | | | | Joint Committee, 1984 | | | | Alberta Comm., 1985 | | | | Macdonald Comm., 1985 | | | | Newfoundland, 1989 | | | | Ghiz Proposal, 1990 | | | | Ottawa, June 1990 | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | by province | | by region | | by province | | by region | | by province | | by region | | by province | | by region | | by province | | by region | | by province | | by region | | by province | | by region | |
| Nfld | 6 | (9.7) | 24 | (38.7) | 12 | (8.3) | 42 | (29.2) | 6 | (9.4) | 24 | (37.5) | 12 | (8.3) | 42 | (29.2) | 10 | (9.6) | 40 | (38.5) | 10 | (8.0) | 35 | (28.0) | 8 | (7.7) | 28 | (26.9) |
| PEI | 6 | (9.7) | | | 6 | (4.2) | | | 6 | (9.4) | | | 6 | (4.2) | | | 10 | (9.6) | | | 5 | (4.0) | | | 4 | (3.8) | | |
| NS | 6 | (9.7) | | | 12 | (8.3) | | | 6 | (9.4) | | | 12 | (8.3) | | | 10 | (9.6) | | | 10 | (8.0) | | | 8 | (7.7) | | |
| NB | 6 | (9.7) | | | 12 | (8.3) | | | 6 | (9.4) | | | 12 | (8.3) | | | 10 | (9.6) | | | 10 | (8.0) | | | 8 | (7.7) | | |
| Que | 6 | (9.7) | 6 | (9.7) | 24 | (16.7) | 24 | (16.7) | 6 | (9.4) | 6 | (9.4) | 24 | (16.7) | 24 | (16.7) | 10 | (9.6) | 10 | (9.6) | 24 | (19.2) | 24 | (19.2) | 24 | (23.1) | 24 | (23.1) |
| Ont | 6 | (9.7) | 6 | (9.7) | 24 | (16.7) | 24 | (16.7) | 6 | (9.4) | 6 | (9.4) | 24 | (16.7) | 24 | (16.7) | 10 | (9.6) | 10 | (9.6) | 24 | (19.2) | 24 | (19.2) | 18 | (17.3) | 18 | (17.3) |
| Man | 6 | (9.7) | 24 | (38.7) | 12 | (8.3) | 48 | (33.3) | 6 | (9.4) | 24 | (37.5) | 12 | (8.3) | 48 | (33.3) | 10 | (9.6) | 40 | (38.5) | 10 | (8.0) | 40 | (32.0) | 8 | (7.7) | 32 | (30.8) |
| Sask | 6 | (9.7) | | | 12 | (8.3) | | | 6 | (9.4) | | | 12 | (8.3) | | | 10 | (9.6) | | | 10 | (8.0) | | | 8 | (7.7) | | |
| Alta | 6 | (9.7) | | | 12 | (8.3) | | | 6 | (9.4) | | | 12 | (8.3) | | | 10 | (9.6) | | | 10 | (8.0) | | | 8 | (7.7) | | |
| BC | 6 | (9.7) | | | 12 | (8.3) | | | 6 | (9.4) | | | 12 | (8.3) | | | 10 | (9.6) | | | 10 | (8.0) | | | 8 | (7.7) | | |
| Ykn | 1 | (1.6) | 2 | (3.2) | 2 | (1.3) | 6 | (4.2) | 2 | (3.1) | 4 | (6.3) | 3 | (2.0) | 6 | (4.2) | 2 | (1.9) | 4 | (3.8) | 1 | (0.8) | 2 | (1.6) | 1 | (1.0) | 2 | (1.9) |
| NWT | 1 | (1.6) | | | 4 | (2.8) | | | 2 | (3.1) | | | 3 | (2.0) | | | 2 | (1.9) | | | 1 | (0.8) | | | 1 | (1.0) | | |
| Total | 62 | (100) | 62 | (100) | 144 | (100) | 144 | (100) | 64 | (100) | 64 | (100) | 144 | (100) | 144 | (100) | 104 | (100) | 104 | (100) | 125 | (100) | 125 | (100) | 104 | (100) | 104 | (100) |

* percentages may not add up to exactly 100 due to rounding.
Note: Reproduced from R.L. Watts & D.M. Brown, eds., *Options for a New Canada*
Toronto: University of Toronto Press, 1991), p. 328

Consultations with aboriginal peoples will proceed in tandem with the work of the Special Joint Committee of Parliament. Participants in the consultations will want to consider the Government's proposal to guarantee aboriginal peoples' representation in the Senate, and the most appropriate means of achieving such representation, bearing in mind the need to ensure that aboriginal peoples are represented in the Senate at least in proportion to their percentage of the population.

The basic structure of the Senate was agreed upon at the Quebec conference in 1864. Equal regional representation, with 24 seats each for Upper Canada, Lower Canada, and the Maritime region of Nova Scotia and New Brunswick, was the key to achieving consensus among the delegates. Quebec, wishing to protect its language, religion and laws, insisted on this division in order to counterbalance Ontario's domination of the House of Commons. The Maritime provinces initially requested a greater number of seats, but only Prince Edward Island, which joined Confederation in 1873, called for equal representation of the provinces. A compromise was reached when it was agreed that if Newfoundland joined the federation, its Senate seats would not be taken from the Maritimes' allotment of 24 seats.[18]

Over the years, a number of proposals for Senate reform have advanced arguments for absolutely equal representation of the provinces in the Senate.[19] Proponents of such absolute equality often refer to the United States and Australia as models. It should be noted, however, that other federations — including Germany, Switzerland, India and Austria — have varied rather than equal representation of constituent units in their second chambers.

In regard to the American system, a major feature distinguishing the United States from Canada is that its 50 states present, both on a national and regional level, a comparatively more balanced mix of small, medium and large states, as well as a more even population distribution overall (for example, the 1988 population in the U.S. Northeast, Midwest, South and West regions represented respectively 21, 24, 34 and 21 per cent of the national population). In contrast, Canada's 10 provinces and two territories not only vary widely in size and population, but this diversity is not compensated by balanced regional or national distribution. Canada's central, western and eastern regions represent respectively 61, 29 and 9 per cent of the national population. Australia's constitution also provides for equal representation of its six states in an elected Senate. In Australia, however, a smaller number of states also produces circumstances that are markedly different from the Canadian situation. The largest Australian states are under-represented in the Senate: the two largest states, for example, have over 60 per cent of the population but only one third of the seats. Overall, however, the three largest states (which together have about 77 per cent of the population) have half of the Senate seats and, therefore, are not outvoted by the smaller

[18] "...the compromise on representation was the political key to union. Representation according to population in the lower house gave assurance that the will of the people as a whole would prevail in federal affairs. Equality of representation in the upper house for each of the three great geographical divisions, on the other hand, was a clear recognition of peculiar sectional and (in the case especially of Quebec) of peculiar provincial interests, and a promise of protection of these interests in the federal Parliament." R.A. MacKay, *The Unreformed Senate of Canada* (Toronto: rev. ed., 1963), pp. 49-50.

[19] See, for example, the Canada West Foundation's proposal of 1981, and Government of Newfoundland and Labrador, *Constitutional Proposal: An Alternative to the Meech Lake Accord*, November, 1989.

states. Translated to Canada, such equal representation would give the six smaller provinces, with less than 17 per cent of the population, the capacity to outvote the other four, which together represent over 80 per cent of Canadians.[20]

The Government believes that a distinctly Canadian model for fair and democratic representation is needed, one recognizing that Canada's history, geography and social make-up differ markedly from those of other countries. In this context, the Government believes that the seats of an elected Senate should be distributed in a much more equitable way than at present.

## Term of Office and Timing of Elections

There are several options for the timing of Senate elections and the terms of office for Senators. There is merit in having Senators face the electorate relatively frequently in order to give the people an opportunity to express their views on a regular basis. There is also merit in giving Senators terms of sufficient length for them to become fully effective in representing the views of their electors.

Various submissions for an elected Senate have attempted to reconcile these objectives through proposals for relatively frequent elections (e.g., three years), with staggered, longer terms for Senators (e.g., six years) so that half the seats for each province come open at each election.[21] Such a system would be similar to the American approach, which provides Senators with six-year terms on the basis of elections, held every second year for one third of the Senate and timed to coincide with elections to the House of Representatives. Similarly, in Australia one half of the Senate's members are elected approximately every three years (thus providing individual Senators with six-year terms), and, whenever possible, Senate elections coincide with general elections for their House of Representatives which normally occur every three years.

The Government has concluded that the requirements of responsiveness and effectiveness in an elected Senate would best be achieved through procedures that are closely tied to those already in place for the House of Commons. It is proposed, therefore, that Senate elections coincide with general elections for the House of Commons, in order to emphasize the federal nature of the Senate and its common legislative agenda with the House of Commons. Similarly, in order to put in place a responsive, easily understood system, it is also proposed that all seats in the Senate come open at each general election.[22]

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[20] Such a system would assign 80% of the seats to the 38% of the population living in Western and Atlantic Canada. Atlantic Canada alone, with 9% of the population, would have 40% of the seats. Prince Edward Island, with 0.5% of the population, would have the same weight as British Columbia with 11% or Ontario with 36%. The Special Joint Committee, 1984, was of the view that such a distribution of seats could jeopardize the credibility of the reformed Senate.

[21] The proposed term of office and timing of elections have varied considerably from proposal to proposal. For example: the Special Joint Committee, 1984, recommended nine-year terms, with elections for one third of the Senators being held every three years; the Alberta Legislature's proposal, 1985, proposed that half the Senate seats be contested at every provincial election.

[22] Simultaneous elections for the House of Commons and the Senate were recommended by the Macdonald Commission, 1985.

The Government is also of the view that Senators ought to continue to be eligible to be members of the Government. Recommendations against such membership in the Cabinet have been advanced in several Senate reform proposals, the basic argument being that membership would compromise the independence of the Senate as a body sensitive to the regions.[23] The counter arguments are that the Cabinet would benefit from specific regional representation, and that in cases where the governing party has no members from a particular province in the House of Commons, the Prime Minister would be able to ensure representation of that province in the Cabinet by having one of its Senators join the Government. Moreover, the added legitimacy of being elected would make highly qualified Senators even more attractive for Cabinet positions.[24] It should also be noted that the Cabinet post of Leader of the Government in the Senate provides an important two-way link between the Government and the Senate. However, because the Senate would not be a confidence chamber, the appointment of Senators to the Cabinet would have to remain the exception rather than the norm.

## Powers of an Elected Senate

The Government has proposed that as a general rule, the approval of the Senate and the House of Commons should be necessary in order for a measure to become law. This recognises the important role that an elected Senate would play in bringing specifically regional concerns to bear on the legislative process.

At the present time, the Senate has powers under the Constitution that are largely parallel to those of the House of Commons. But because its members lack democratic legitimacy, the Senate has not in modern times attempted to confront the House by an outright rejection of bills approved by the Commons.[25] The practice has been to delay legislation and to use the delay to negotiate compromises with the Government and, in the case of the Canada-United States Free Trade Agreement, to await the outcome of a general election. The Government's proposals for an elected Senate will provide Senators with the legitimacy and leverage they now lack. The proposed Senate would be effective because elected Senators will be able to speak for the people they represent in the different regions of the country.

A number of proposals for a reformed Senate have advocated powers equal to those of the House of Commons in matters of particular importance to the regions. Many of the proposals made since the late 1970s follow the logic of the German

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[23] The Special Joint Committee, 1984, reported: "...If ministers are drawn from the Senate, cabinet solidarity would prevail over their responsibility as regional representatives." (p. 32)

[24] The Macdonald Commission, 1985, supported the possibility of having ministers drawn from the Senate: "A Senate elected by proportional representation would usually permit the governing party to constitute a Cabinet that included representatives from all regions because it would contain men and women from all regions capable of assuming Cabinet positions." (p. 89)

[25] While it was not uncommon prior to 1940 for government bills to be rejected by the Senate, in most cases this involved matters of little public interest. There have been some celebrated exceptions: in 1913 the Borden Government lost its controversial and politically critical Naval Bill; in 1926 the King Government suffered rejection of an Old Age Pension Bill; and in 1961 the Senate blocked the Diefenbaker Government's bill to effect the dismissal of the Governor of the Bank of Canada.

model, where the *Bundesrat* has a final veto over matters directly affecting the interests of the Länder (states), but only a suspensive veto over other legislation passed by the lower house (the *Bundestag*).

Some proposals have envisaged a comparatively broad application of the absolute veto for the Senate.[26] Others have put forward suggestions for a more limited power of absolute veto, and a broader use of a suspensive veto by an elected Senate.[27]

As a consequence of the principle of responsible government, the Cabinet is not dependent on the upper house of the legislature in order to continue in office. The principle of responsible government requires that the Government depend on the day-to-day support of a majority of the members of the House of Commons for its continuation. This principle is reflected in all parliamentary systems, whether federal or not. It is fundamental to parliamentary democracy. Lower houses, such as the House of Commons, are elected on the basis of representation by population. This ultimate expression of the democratic principle is what distinguishes and must give pre-eminence to the House of Commons in our parliamentary system.

It follows that the elected Senate should *continue* not to be a confidence chamber. It should be free to express regional viewpoints. This means its members should not be tied closely to the normal requirements of party discipline, necessary in the House of Commons to ensure the survival of the Government of the day.

As it will not be a confidence chamber, the Senate's powers ought not to be so extensive that it could block the will of the House in voting revenues and funds, thus preventing the Government from carrying on the provision of day-to-day government services, without which the country would be left ungoverned. The challenge in Senate reform is to empower the institution in such a way that it makes government more effective, rather than creating the potential for sterile deadlock between the two Houses of Parliament.[28]

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[26] For example, the Government of British Columbia, 1978, recommended that the upper house exercise an absolute veto in such areas as federal laws administered by the provinces, use of Parliament's declaratory power and of the federal spending power in areas of provincial jurisdiction and judicial and other appointments. The Senate would exercise a three-month suspensive veto over all other matters. The Pepin-Robarts Commission, 1979, proposed that the Council of the Federation have a full veto over treaties and federal legislation in matters of provincial jurisdiction, and a suspensive veto over treaties and federal legislation in areas of concurrent jurisdiction. The Alberta Legislature's proposal, 1985, recommended a full veto on any bill other than a supply bill, including a veto requiring a double majority (English or French, as required) on language issues.

[27] The Macdonald Commission, 1985, proposed a full veto requiring a double majority (i.e. a majority of francophone Senators and an overall majority) on legislation of special linguistic significance, and a six-month suspensive veto on all other legislation. Similarly, the Special Joint Committee, 1984, recommended an absolute veto requiring both an overall majority and a francophone majority on legislation affecting language and culture, and a 120-day suspensive veto for all other legislation (except supply bills).

[28] The dangers of deadlock were evidenced by the Australian constitutional crisis of 1975. This crisis arose when Prime Minister Whitlam's government, which enjoyed majority support in the House of Representatives, was refused supply by the opposition-controlled Senate. The government, which was fast running out of money, argued that the Senate had, by convention, no right to block supply as passed by the House and sought to have an extraordinary election of half the senators called to break the impasse. However, Governor General Kerr responded by dismissing the Prime Minister and appointing the Opposition Leader, on the understanding that the latter would immediately recommend double dissolution and an election for both houses. This crisis demonstrates how the affairs of state could be completely paralysed if the ultimate responsibility for overseeing the government does not clearly rest with the House of Commons in its role as the most democratically representative chamber.

In order to provide an effective representation of regional interests, and in recognition that the House of Commons should continue to be the confidence chamber, the Government has proposed that the elected Senate should have the same powers as the House of Commons except:

i. in matters of particular national importance, such as defence and international affairs, where the Senate would have a six-month suspensive veto, following the expiry of which the House of Commons would be required to repass the legislation in question;

ii. in respect of appropriation bills and measures to raise funds, including borrowing authorities, where the Senate would play no legislative role.

To protect and promote regional interests, in all other matters the Senate would exercise an absolute veto.

The Government has also proposed that the elected Senate have an absolute veto in matters of language and culture. Senate approval on such matters would require the support of a double majority. The Special Joint Committee will want to consider in particular the definition of culture, as well as the procedure for declaring a bill to fall within the definition of language and culture, because these will be important in order for this provision to be fully effective. It will also need to consider the form of double majority that should be required.

The proposal for a six-month suspensive veto in matters declared to be of particular national importance would provide an elected Senate with important leverage of more practical use in the day-to-day transaction of the Senate's business than its current, but largely theoretical, capacity to block indefinitely the will of the House of Commons. As elected representatives, Senators would have increased legitimacy and would be in a much better position to negotiate changes in Government bills that come from the House of Commons, and joint mechanisms for working out such compromises may well become the norm.

Senators would continue to have the right to introduce legislation on any subject, except to impose taxes or to spend. The Senate would play no role in approving appropriation bills or in routine revenue raising and borrowing authorizations. Not being a confidence chamber, it would be inappropriate for the Senate to have powers that could challenge the capacity of the Government to provide day-to-day government and continuity in the delivery of services to the public.[29] This limitation on Senate powers over appropriations and routine revenue raising would not apply to other "money bills" (i.e., bills accompanied by a royal recommendation). These other money bills, including proposals for fundamental tax reform, would be subject to an absolute Senate veto.

In addition, the Senate would continue to fulfil its long-established function of in-depth inquiry into any matter, and its careful examination of the detail of bills and statutory instruments.

[29] Note that both the Special Joint Committee of the Senate and House of Commons on Senate Reform, 1984, and the Alberta Legislature's proposal, 1985, recommended that the Senate have no veto over supply bills.

The Government has also proposed that the heads of regulatory bodies and national cultural institutions reporting to Parliament might appropriately have their appointments ratified by the Senate.[30] This would recognise the impact that such independent decision-makers have on the regions. The Government has proposed, therefore, that the Senate have the power to ratify the appointment of the Governor of the Bank of Canada and the appointments of the heads of regulatory agencies that impact directly on the regions, such as the Canadian Radio-television and Telecommunications Commission, the National Energy Board, the National Transportation Agency, the proposed Canadian Environmental Assessment Agency, and the Immigration and Refugee Board. Because of their importance to Canada's national identity, the Government has also proposed that the appointments of the heads of cultural agencies such as the Canadian Broadcasting Corporation, the National Film Board, the National Library, the National Archives, the national museums, the Canada Council, the Canadian Film Development Corporation and the National Arts Centre be ratified by the Senate.

## Implementation

The changes that the Government has proposed in the powers and method of selection of the Senate constitute amendments to the Constitution that fall within the scope of section 38 of the *Constitution Act, 1982*, requiring the agreement of two-thirds of the provinces representing at least 50 per cent of the population. It may also be that the changes proposed in the method of selecting Senators as they affect Quebec would require the specific approval of that province.[31]

[30] A Senate veto over appointments to certain key agencies has been recommended in a number of reform proposals, notably by the Government of British Columbia, 1978, and the Special Joint Committee, 1984.

[31] Because sections 22 and 23(6) of the *Constitution Act, 1867* make special provision for the way in which Quebec is represented in the Senate, the authorization of Quebec's legislative assembly may be required under section 43 of the *Constitution Act, 1982*.

# Supreme Court

***The Supreme Court of Canada***

The Government of Canada will introduce a constitutional amendment to provide for a role for the provinces and the territories in Supreme Court appointments whereby appointments would be made by the federal government from lists of nominees submitted by provincial and territorial governments, the individual appointed being acceptable to the Queen's Privy Council for Canada.

In addition, the Government of Canada would be prepared to proceed with the entrenchment in the Constitution of the Supreme Court and its composition if it were found desirable to proceed with any unanimity items in the final package.

## A New Appointment Procedure

The rule of law is fundamental to our democratic institutions, and the independence of the judiciary guarantees the maintenance of the rule of law. At the apex of the judicial system stands the Supreme Court of Canada. It was created in 1875 as a general court of appeal. In 1949, with the abolition of appeals to the Judicial Committee of the Privy Council in the United Kingdom, the Supreme Court became the court of final resort in all new cases emanating from Canadian courts and tribunals. In addition to cases which come to the Court on appeal from lower appellate courts, the Supreme Court is empowered to hear references from the federal government on important issues. This reference power, although limited in use, is an important mechanism for determining the legal and constitutional validity of important issues, while avoiding prolonged proceedings in the lower courts. With the adoption of the Canadian Charter of Rights and Freedoms, the Supreme Court has become an even more important and influential national institution.

This institution is not, however, entrenched in the Constitution. Rather, it is established under a federal statute, the *Supreme Court Act*. Under the terms of this Act, the Supreme Court is composed of nine judges, including the Chief Justice of Canada, who are appointed by the Government of Canada. The *Supreme Court Act* stipulates that at least three of the judges of the Court must be selected from the bench or bar of the province of Quebec, in recognition of its civil law tradition. By convention, the remaining judges are appointed in order to ensure a broad cross-section of representation from other regions of the country. Usually, three judges are appointed from Ontario, two from the West, and one from the Atlantic provinces.

The Meech Lake Accord sought to entrench the Supreme Court in the Constitution and to provide a role for the provinces in the appointment process. Although the Government still advocates entrenching this fundamental institution, it recognizes that this may not be possible in the current context, as such an amendment would require the unanimous consent of the legislative assemblies of all provinces.[32] The Government continues to support these Meech Lake Accord proposals and would be prepared to recommend them if it were found desirable to proceed with any unanimity items in the final package.

In recognition of the essential role played by these judges in the life of the nation, the Government once again proposes that Supreme Court judges, other than the Chief Justice, be selected from lists of qualified persons acceptable to the Government submitted by provincial and territorial governments.[33] According to this proposal, the minimum of three judges from Quebec, as already required by the *Supreme Court Act*, would be named from lists submitted by the Government of Quebec. Under this new procedure, whenever a vacancy occurs in the Court, the Minister of Justice will invite his or her provincial and territorial counterparts, depending on which part of the country is affected by the vacancy, to submit lists of five suitable nominees within 90 days (if the vacancy is for a judge from Quebec, only the Government of Quebec will be involved). If the concerned provinces and territories do not satisfy this requirement, the Government of Canada will nevertheless proceed with the appointment, as it is vital that vacancies be filled promptly. It is proposed that this process for appointments be entrenched in the Constitution.

The Government will encourage consultations with outside groups and the employment of broad criteria in determining the qualifications of nominees so that the concerns of others, in addition to provincial and territorial governments, are taken into account.

The Government's proposals for change in the way in which Supreme Court judges are appointed reflect the importance of the institution to the country as a whole and to the maintenance of clearly understood and effective relations between the federal and provincial levels of government.

## Implementation

The new appointment procedure for Supreme Court justices would be set out in the Constitution by way of an amendment requiring the consent of Parliament and the legislative assemblies of at least seven provinces representing 50 per cent of the population, pursuant to section 38 of the *Constitution Act, 1982*.

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[32] Pursuant to section 42(1)(d) of the *Constitution Act, 1982*, most amendments to the Constitution concerning the Supreme Court are made under the section 38 general amending formula (7/50). However, the entrenchment of the Supreme Court in the Constitution would require provisions setting out the composition of the Court, and such amendments can only be made with the unanimous consent of Parliament and of all provincial legislative assemblies, pursuant to section 41(d).

[33] While the Meech Lake Accord did not provide for territorial involvement in the appointment process, the Prime Minister and provincial Premiers agreed at the June 1990 First Ministers' Meeting on the Constitution that the governments of the Yukon and the Northwest Territories would also submit lists of nominees.

# Working Together: A Council of the Federation

***A Council of the Federation***

**The Government of Canada proposes the entrenchment of a Council of the Federation, composed of federal, provincial and territorial governments, that would meet to decide on issues of intergovernmental coordination and collaboration. The Council would have the mandate to vote on proposed federal legislation to enhance the functioning of the economic union under the proposed new head of power; to vote on guidelines for fiscal harmonization and coordination as well as to decide on processes to improve future collaboration in this area; and to make decisions on the use of the federal spending power on new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction. All decisions of the Council of the Federation would require the approval of the federal government and of at least seven provinces representing 50% of the population.**

## The Need for Harmonization

In its proposal the Government has explained that, by its nature, a federation requires extensive cooperation and harmonization between the two levels of government. Powers, even those assigned exclusively to one level, can seldom be exercised in a vacuum. The power to make international treaties, for example, lies exclusively with the federal government, but the measures to implement such treaties are sometimes within the constitutional sphere of the provinces. Many other powers are shared either formally, as with agriculture and immigration, or in practice as in the development of shared cost programs in areas of provincial jurisdiction (e.g., health services).

The reality is that all the powers of the federation cannot be allocated and exercised in watertight compartments. There must be cooperation.

## Machinery for Coordination

There are two basic approaches to the problem of harmonizing the activities of the different levels of government in a federation.

The first is through the use of *formal* coordinating machinery. This can involve the use of the upper house of the federal legislature for the purpose of representing the interests of the provinces or states, along the lines of the German *Bundesrat* described earlier in this paper. Alternatively, use can be made of institutions outside the federal legislature. The Australian Loans Council, a constitutionally entrenched mechanism in which the commonwealth and state governments in Australia coordinate borrowing activities, is an example of this sort of body.[34]

The second approach relies on *informal* coordination. This approach is illustrated by the United States, where the political ties between state governors and members of Congress and the executive are the most prominent feature of a highly informal approach to harmonization between the two levels of government.[35]

As noted in the introduction to this paper, Canada has also relied on informal machinery to share information and to coordinate the actions of the federal and provincial governments. To achieve this result it developed an elaborate system of federal-provincial working relationships. In addition to First Ministers' Conferences, of which there have been more than 60 since Confederation, there are more than 500 intergovernmental meetings a year involving federal and provincial councils of ministers and committees of officials, dealing with diverse subjects ranging from law enforcement to budgetary policy. All this activity fits loosely under the umbrella of First Ministers' Conferences.

In short, there is no lack of coordinating machinery, but it has not provided altogether effective coordination. The existing machinery has been successful in promoting a degree of cooperation between the two levels of government, but its usefulness in helping Canadian governments respond to the economic challenges of the modern world is weakened by the lack of formal decision-making authority and public visibility.

Accordingly, in its proposal, the Government has suggested means to build decision-making authority into existing machinery, and to entrench these functions in the Constitution through the creation of a Council of the Federation. The composition and method of functioning of the Council will be designed in close collaboration with the provincial and territorial governments. The Council would be made up of representatives at the ministerial level of the federal, provincial and territorial

[34] The extensive participation of cantonal legislators as elected members of the two houses of the Swiss parliament provides another interesting example of intergovernmental coordination. The Federal Assembly of Switzerland comprises the National Council (elected on the basis of representation by population) and the Council of the States (elected on the basis of two members for each full canton and one for each half canton). The two houses have equal status and together elect the seven members of the Federal Executive Council chosen to head federal departments and among whom rotates the position of head of state and government. The legislative authority of the Federal Assembly and of the Canton governments is subject to a wide range of obligatory and optional referenda provisions.

[35] There have in fact been only three summit meetings between the President of the United States and the state governors: in 1909 to discuss the environment; in 1933 to tackle the Depression; and in 1989 to discuss education.

governments.[36] In its proposal, the Government has suggested a primarily economic role for the Council. Depending on its success, this could later be expanded to other areas of federal-provincial cooperation where joint decision making may be beneficial.[37]

The Government would also like to see Canada's federal-provincial intergovernmental processes, sometimes referred to as "executive federalism", be more open to public scrutiny and input. The Council's entrenchment in the Constitution as a formal decision-making body would help achieve such openness.

## The Need for Decision-Making Authority

Concerted, timely and decisive action between the two levels of government would make the operation of the federation more efficient. Joint decision making in areas of shared activity would give Canadians better, more responsive government and improve Canada's competitive position.

The Government has, therefore, proposed that the Council of the Federation be given authority to make binding decisions. Through the Council, the provinces would have a decision-making role in approving federal activities in areas that affect them. At the same time, the process of securing provincial agreement in matters requiring joint action would be accelerated.

Provincial approval would be achieved by adapting the representative principle that underlies the main amending procedure for the Constitution. This is to say, federal proposals would be ratified, provided at least seven provincial governments representing at least 50 per cent of the population agree. In cases where this approval is not forthcoming, the proposed federal initiative would be abandoned.

Proposals requiring the ultimate approval of Parliament and the Council would require extensive consultations between the two levels of government in order to determine whether there was adequate consensus to take action. On the basis of such consensus, the federal government would table appropriate legislation in Parliament, and both levels of government would follow the parliamentary process closely. Changes proposed would be canvassed with the provinces in order to ensure the ability of the Council to ratify whatever legislation is finally adopted.

The Government recognises that management of the economic union is an area of shared responsibility, where coordinated decision making is essential if Canada is to be economically efficient and able to compete globally. Therefore, it is proposing that this joint decision making be implemented by allowing the Council and Parliament, working together, to put in place necessary Canada-wide legislation for the efficient functioning of the economic union. It is also proposing that the Council have the authority to establish and promulgate, through federal legislation under that

[36] The territorial governments' representatives would be non-voting members, while the provincial representatives would each have one vote.

[37] Similar bodies, albeit with different structures and powers, have been put forward in other proposals for constitutional reform. See, for example, the Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation*, 1980, chap. 9; and Melvin H. Smith, Q.C., *The Renewal of the Federation: A British Columbia Perspective* (Victoria, 1991), chap. 3.

same head of power, guidelines to co-ordinate fiscal policies between the two levels of government and to harmonize those policies with monetary policy. The Council would also be the forum for the joint development of other measures to improve fiscal harmonization.[38]

A federal initiative would come into force throughout Canada if approved by Parliament and the Council of the Federation. A dissenting province (of which there could be a maximum of three under the approval formula) could opt out for a period of three years where this is supported by 60 per cent of the members of the provincial legislative assembly. The Government has asked the Special Joint Committee to consider whether and in what circumstances dissenting provinces could renew their decisions to opt out. Where the provinces choose to launch a proposal using these new powers, federal agreement would in all cases be essential, since approval of such proposals would once again follow the basic principle of the general constitutional amendment procedure.

The Government of Canada has made a commitment that it would only introduce new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction with the approval of at least seven provinces representing 50 per cent of the population. The provinces would participate with the federal government in ensuring appropriate levels of service to Canadians, and in setting the terms and conditions for any change in federal financing of such programs. Provinces would have the right to opt out with compensation, provided their own programs meet the objectives of the new national program.

As noted, the machinery to carry out these functions exists today in the conferences, councils and committees referred to earlier. The innovation would be empowering a body at the ministerial level to make decisions that are binding, and to do so publicly. No new bureaucracy would be required.

The Council in its various forms would meet on a regular basis in existing federal and provincial facilities under the chairmanship of the federal government, with secretariat support provided by existing staff.

## Implementation

Subject to discussion with the provinces and the report of the Special Joint Committee, the Government proposes to entrench the Council of the Federation in the Constitution. The Council could be entrenched under the general constitutional amending formula that requires the consent of Parliament and the legislative assemblies of at least seven provinces representing 50 per cent of the population, pursuant to section 38 of the Constitution Act, 1982.

[38] These matters are set out more fully in the background paper *Canadian Federalism and Economic Union: Partnership for Prosperity.*